UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2020-UNAT-982

Asghar

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Dimitrios Raikos Judge Jean-François Neven
Case No.:	2019-1281
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Ms. Asghar:	Sultan Khalid
Counsel for Secretary-General:	Patricia C. Aragonés

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Ms. Asma Asghar contested the decision to dismiss her from service with the Quetta Zone Office of the United Nations Children's Fund in Pakistan (QZO and UNICEF, respectively), for having committed fraud, causing financial and reputational loss to UNICEF. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) upheld Ms. Asghar's application, in part, but it affirmed the dismissal decision on the strength of a transcript of a telephone conversation said to have taken place between Ms. Asghar and a consultant with the local government. For the reasons set forth below, we vacate the UNDT Judgment and remand the case to the Dispute Tribunal before a different Judge for fresh determination consistent with the instructions in this Judgment.

Facts and Procedure

2. Ms. Asghar joined the Pakistan Country Office (PCO), UNICEF, on 17 May 2010 as a Registry Assistant at the G-3 level with the QZO. In September 2011, she was promoted to Programme Assistant at the G-5 level, QZO, first assisting both the Child Protection (CP) Section and the Water Sanitation and Hygiene (WASH) Section, and later exclusively the CP Section.

3. The Pakistan Country Office works in close collaboration with government agencies, civil society organizations and other key development partners in the form of technical, human, supply and financial assistance for the achievement of rights for all children and women. Some 70 per cent of total UNICEF resources in Pakistan are channeled through cash assistance towards its implementing partners (IPs). Ms. Asghar's responsibilities in the CP Section included reviewing and checking the supporting documents submitted by UNICEF's IPs for accuracy of calculations and contacting the IPs if their accounts were incomplete or their documents were missing.

4. When she joined the QZO in 2010, Ms. Asghar was supervised by Ms. Aneeta Aahooja, Child Protection Officer. From June 2014 to July 2015, Ms. Aahooja was overseas on study leave. During that period of time, Ms. Asghar was supervised first by Mr. Muhamad Ishaq, and then by Mr. Imtiaz Ahmed.

5. In February 2015, an investigation was commenced following a formal complaint made to the Office of Internal Audit and Investigations (OIAI), UNICEF, by the UNICEF Country Representative in Pakistan, alleging possible corruption and collusion by Ms. Asghar through the

payment to her of kickbacks by a number of IPs. On 20 February 2015, Ms. Asghar was placed on administrative leave, with pay.

6. On 5 August 2015, an OIAI investigation specialist together with a staff member from the PCO interviewed Ms. Asghar.

7. In June 2016, the OIAI issued the investigation report on a number of allegations of corruption, conflict of interest, fraud and kickbacks against Ms. Asghar. However, for reasons that will become apparent in due course, it is necessary to review and consider the evidence and findings of the OIAI in relation to only one of the various allegations of fraud investigated by the OIAI, namely that concerning the arrangement of a "protective learning and community emergency services" (PLaCES) event which did not in fact take place. The charge letter of 15 September 2016 written by the Director, Division of Human Resources, UNICEF, and the OIAI investigation report fully set out the basis of this charge.

8. After he was appointed as a Child Protection Officer, QZO, in October 2014, Mr. Ahmed reported to the QZO Chief Financial Officer that he suspected irregularities in the dealings between the staff of the CP Section and an IP named the Social Welfare Department (SWD) in relation to direct cash transfer (DCT) requests.

9. The OAIA investigation report refers to and relies upon a transcript of an incriminating telephone conversation dealing *inter alia* with the PLaCES event.[1] Sometime in January 2015, Mr. Muhammed Asif, a consultant with the local government and a collaborator with the CP Section, apparently recorded a telephone conversation between himself and Ms. Asghar, without her knowledge. It appears *ex facie* the transcript that Ms. Asghar and Mr. Asif discussed the urgent need for Ms. Asghar to receive her "share" of "the savings" from a certain activity referred to as "vehicle and children's day" after deduction of all the actual expenses, as she was about to take a long leave of absence from office. Ms. Asghar and Mr. Asif then turned to the subject of the planning of the PLaCES event. The most relevant part of the transcript reads as follows:

> **Asma** (Ms. Asghar): [A]nd how about PlaCES[?]
>
> **Asif**: We are thinking that if we did it in Serena [Hotel] there would be lesser saving.

[1] It is not clear from the record when this telephone conversation took place, whether the recording was authenticated, or who transcribed the telephone conversation.

> **Asma**: [D]o it in BBSA.[2] Just tell that you have always been doing it there and it is fine. Imtiaz [Mr. Ahmed) would be gone also.
>
> **…**
>
> **Asma**: [D]on't tell Imtiaz that you are doing it at BBSA.
>
> **Asif**: [D]o you really want to do this activity or want to skip it. And only want documents prepared for it?
>
> **Asma**: [A]ctually I am waiting for him (Imtiaz) to leave. Once he is gone then just say that we have done it. He will only ask me to attend and I will. He unnecessarily insists upon monitoring every activity. This is not a norm of this office. No one attends every activity. …Well, good enough that all activities have happened, only PLaCES is left. I had told you previously also that we will skip this activity, and only create documents.
>
> **…Asif**: … OK let me speak with Imtiaz about PLaCES.
>
> **Asma**: (whisper) No. Once he has gone on leave, then you send him email. He likes things in writing. Invite him over email. Announce to him that we have planned this activity at BBSA, these are the date, time, participants and complete plan. And remember, you are not aware that Imtiaz is leaving.

10. The OIAI investigation report indicates that the audio recordings reflected in the transcript were played to Ms. Asghar during the OIAI interview conducted with her in August 2015. The report records that she denied that she intended to financially benefit from the non-existent event that never took place. She appears not to have taken issue at that time with the authenticity of the audio recordings or the accuracy of the transcript.

11. It is alleged that subsequent to the conversation forming the subject matter of the transcript, Ms. Asghar, in an e-mail dated 23 January 2015, informed Mr. Ahmed that the SWD was planning to organize a one-day training workshop on PLaCES the next day, Saturday, 24 January 2015 at the BBSA, from 9:30 am to 16:30 pm., but the detailed plan was not yet available due to electricity breakdown. She asked Mr. Ahmed to approve the event. Ms. Asghar's brother allegedly worked at the BBSA.

12. Mr. Ahmed responded by e-mail on the same day as follows:

> As discussed yesterday telephonically, we can go ahead with this activity provided that we are well prepared and all the preparations of this activity are in line. As you know that I am away from office, coming back on Monday therefore I will request you to take the lead on this activity to check all such preparations by the SW department including participants'

[2] BBSA stands for the Balochistan Boys' Scouts Association in Quetta.

> list, who will be the facilitators, coordination with organizations/depts. etc.[] If you feel that everything is in place then we can certainly go along with this activity.
>
> At the same time I will also request you to attend the said activity from CP section and provide a brief report as well after the activity (as a detailed report will be shared by SWD later as they do it for all the activities).

13. After he had dispatched the e-mail to Ms. Asghar, Mr. Ahmed wrote an e-mail on 23 January 2015 to Mr. Zaheer Chand, a colleague working for the UNICEF Balochistan Provincial Office in Quetta, asking the latter to visit the PLaCES event "to participate in as well [as to] monitor".

14. In an e-mail dated 24 January 2015, Mr. Chand reported to Mr. Ahmed as follows:

> As per your request I visited BBSA today at around 1300 hours. There was no such activity going on, and upon inquiring from the BBSA attendants I was told that entire BBSA had no plans booked from any organization for today.

15. On 28 January 2015, after his return to office, Mr. Ahmed addressed an e-mail to Ms. Asghar asking for an update on the event. Ms. Asghar replied in an e-mail which read as follows:

> - The activity held at Boys [S]cout's [H]all started at 9:30 till 14:00 hrs. [S]essions started by the recitation of holy Quran and introduction of participants. Mr. Abdul Sattar and Mr. Waseem Kamran facilitated the sessions by power point presentation.
> - Mr. Kamran welcomed the participants
> - A pretest was held to check the understanding level of the participants regarding PLaCES
> - The sessions were very interactive, participatory and attentive
> - An active participation were [sic] observed during the sessions
> - During the session participants were involved in role play for better understanding of how to act in an emergency situation[]
> - Q/A sessions after the presentation by the participants
> - Post test
> - Vote of thanks by Mr. Kamran
>
> Over all One[-]day training workshop on PLaCES was found satisfactory.

16. On the basis of the transcript, the contemporaneous correspondence and e-mails, the OIAI concluded that Ms. Asghar had colluded with a government IP (SWD) to make her supervisor believe that the PLaCES event was taking place as planned, for which UNICEF advanced PKR 639,000,[3] fully knowing that such an event would not take place.

17. There was also evidence of similar incidents of excessive or false charging and that Ms. Asghar had improperly been given a subsidized vacation by another IP. By the letter of 15 September 2016 referred to above, the Director, Division of Human Resources, UNICEF, charged Ms. Asghar with the following charges:[4]

(a) Without authorization, accepting receipt of a gift, in the form of a free or subsidized vacation, from a UNICEF civil society partner (a non-governmental source having, or seeking to have, a contractual relationship with UNICEF); and

(b) Arranging, and assisting in, submission and fulfilment of false claims from UNICEF resources, for the personal benefit of herself, Ms. Aahooja or staff of civil society partners, and causing financial and reputational loss to UNICEF.

18. Ms. Asghar provided her response to the charge letter on 8 January 2017.

19. In a letter dated 18 January 2017, the then UNICEF Deputy Executive Director, Management (DED/M), informed Ms. Asghar of the decision to dismiss her from service effective the date that she received the letter, on the basis that there was clear and convincing evidence that Ms. Asghar had committed the misconduct of fraud, or alternatively gross negligence. In particular, the DED/M found that:

(a) From June to October 2013, Ms. Asghar had failed to disclose a conflict of interest in respect of a close relationship she had with a senior member of an UNICEF IP (Initiative for Change), and in respect of the financial assistance that she had received from the senior member of the Initiative for Change for

[3] PKR stands for Pakistani Rupee. As at 30 January 2015, one USD was equal to 100.95 PKR.
[4] The charge letter accused Ms. Asghar of having violated Staff Regulations 1.2 (b), (g), (l) and (m), and Staff Rules 1.2 (m) and (p); CF/EXD/2013-008 (UNICEF Executive Directive "Policy prohibiting and combatting fraud and corruption", dated 29 August 2013), s. 2.1; CF/EXD/2012-005 (Executive Directive "Disciplinary process and measures", dated 30 November 2012), s. 1.4 (a), (b), (h), (i), (k), (l) and (m); and CF/EXD/2012-003 (Executive Directive "Financial disclosure and declaration of interest statements", dated 16 May 2012), s. 2.3.

an expensive vacation arranged by the senior member of the Initiative for Change;

(b) From October 2013 to April 2014, Ms. Asghar had colluded with an IP to artificially over-procure excessive and fraudulent printing costs paid in respect of a birth registration project;

(c) On 12 June 2014, Ms. Asghar had colluded in fraud with staff of another IP (Society for Community Development) to arrange kickbacks, diverting funds in the form of excessive and fraudulent charges paid to the Labour Department in respect of an International Child Labour Day conference (PKR 1,507,000 or USD 14,928); and

(d) On 24 January 2015, Ms. Asghar arranged for UNICEF to be fraudulently charged for a "protective learning and community emergency services" (PLaCES) event which did not in fact take place. In this connection, the DED/M found that the recorded and transcribed telephone conversation between her and Mr. Asif was undeniable and Mr. Asif's admissions against his own interest detailed, clear and convincing.

The DED/M stated that those instances of misconduct of fraud supported by clear and convincing evidence individually or cumulatively, in addition of the lack of any expression of remorse on the part of Ms. Asghar, warranted her dismissal from service.

20. On 26 April 2017, Ms. Asghar filed an application with the Dispute Tribunal contesting the 18 January 2017 decision to dismiss her from service. In its Judgment No. UNDT/2019/074 dated 3 May 2019, the UNDT upheld Ms. Asghar's application in part and rescinded UNICEF's findings in respect of Ms. Asghar receiving a free or subsidized vacation from a UNICEF IP, and her colluding with an IP to artificially over-procure excessive and fraudulent printing costs paid in respect of a birth registration project.

21. However, the UNDT dismissed Ms. Asghar's application in respect of the two remaining charges: her arranging for UNICEF to be charged for the non-existent PLaCES event and her fraudulent collusion with the staff of another IP (Society for Community Development) to arrange kickbacks, diverting funds in the form of excessive and fraudulent charges paid to the Labour Department, in respect of the International Child Labour Day

conference. The UNDT thus affirmed the decision to terminate Ms. Asghar's employment on the basis of these two charges.

22. While the Judgment of the UNDT pronounces at length and in inordinate detail upon the methodology of the OIAI investigation and the loss of certain documentary evidence leading it to set aside the decisions on the first two charges, its findings in relation to the two charges it sustained are somewhat cryptic by comparison. That said, the UNDT was evidently satisfied that the "genuine" recording and the "plain meaning of the contents"[5] of the telephone conversation between Ms. Asghar and Mr. Asif in January 2015 constituted clear and convincing evidence supporting the charge of fraud against Ms. Asghar in respect of her role in arranging for UNICEF to pay for the non-existent PLaCES event and receiving kickbacks in relation to the International Child Labour Day conference. It held in relation to the legality and admissibility of the secret recording of the telephone conversation that no rule or regulation made such a recording illegal within the Organization and that the transcript was admissible evidence as its probative value outweighed any possible prejudice caused to Ms. Asghar. In its view, the transcript of the conversation spoke for itself and was sufficient to establish the misconduct, even though Mr. Asif had been found to be an unreliable witness in the case of *Aahooja*.[6] The UNDT thus found that the DED/M's conclusion that Ms. Asghar had engaged in collusion in fraud or had been grossly negligent resulting in financial loss to UNICEF was correct and unassailable and held further that, given the fraudulent nature of the misconduct, the sanction of dismissal was proportionate.

23. Ms. Asghar appeals to this Tribunal against these findings. As per Order No. 352 (2019) dated 13 July 2019, the United Nations Appeals Tribunal (Appeals Tribunal) granted Ms. Asghar's request for time limit extension. She filed an appeal of the impugned UNDT Judgment on 2 August 2019. The Secretary-General filed his answer on 1 October 2019.

[5] Impugned Judgment, para. 82.
[6] *Aahooja v. Secretary-General of the United Nations*, Judgment No. 2019/UNDT/033 dated 27 February 2019.

Submissions

Ms. Asghar's Appeal

24. Ms. Asghar made a number of submissions regarding the deficiency of the investigation by the OIAI and the factual findings made by the UNDT. As the issue on appeal is restricted to the sufficiency of the evidence in relation to the PLaCES and Child Labour Day conference charges, it is unnecessary to canvass all her submissions and the responses thereto.

25. Most relevantly, Ms. Asghar points out that, although the UNDT found that the investigator had committed certain irregularities which tainted the investigative fact-finding, it upheld the finding of fraud in relation to the two remaining charges on the basis of untested hearsay evidence.

26. Ms. Asghar complains that there was no probe into the crucial aspects of the case, showing a serious deficiency in the interview, the investigation and the charge letter. The e-mails relevant to some of the alleged misconduct were deleted. Tangible evidence of personal gains and benefits was altogether missing. As a result, Ms. Asghar could not provide the details of her e-mails to prove her innocence. There was no evidence to prove that she had *mens rea* to defraud UNICEF or that she had benefited personally.

27. The investigation report referred to numerous witnesses both from UNICEF and the counterparts, yet such persons were not called to testify and to prove the allegations of fraud, collusion, misappropriation and misconduct.

28. Moreover, the veracity and authenticity of the transcript of the telephone conversation upon which her conviction ultimately rested was not forensically tested in any manner. There were also legitimate questions about the credibility of Mr. Asif, who allegedly recorded the conversation, which were not tested in cross-examination as he did not appear as a witness before the UNDT. Ms. Asghar persists with her objection to the admissibility of the transcript as she was not informed that the conversation was being recorded.

29. Ms. Asghar requests that the Appeals Tribunal set aside the dismissal decision and order that she be reinstated, and be paid unspecified back benefits, costs and damages.

The Secretary-General's Answer

30. The Secretary-General contends that the UNDT correctly determined that the imposed disciplinary sanction of dismissal was lawful, as the facts on which the disciplinary measure was based had been established to the appropriate standard, the established facts legally amounted to misconduct and the sanction imposed on Ms. Asghar was proportionate.

31. Contrary to her submissions, the UNDT did find that Ms. Asghar had intended to defraud UNICEF and her remarks during her telephone conversation with Mr. Asif disclosed a calculated activity. The transcript of the telephone conversation shows that Ms. Asghar discussed the calculation of her "share" and that of the others from the "savings" from the UNICEF activities. Ms. Asghar's remarks support a reasonable inference of personal benefit. By colluding in the diversion and misappropriation of UNICEF funds, Ms. Asghar irreparably breached the relationship of trust between her and the Organization, and the gravity of her misconduct and the lack of any expression of remorse were aggravating factors that were not mitigated by her length of service or positive performance appraisals.

32. The UNDT properly concluded that the audio recordings and the corresponding transcript of Ms. Asghar's telephone conversation with Mr. Asif were properly before it. Ms. Asghar's due process right in respect of the evidence of transcript was fully respected, as she was duly notified of the allegations against her, heard the audio recordings, reviewed the transcript and had multiple opportunities to respond to the allegations against her and rebut the content of the recorded conversations.

33. None of Ms. Asghar's submissions on appeal provide any basis for calling into question the UNDT's reasonable findings and conclusions. She has failed to establish any error on the part of the Dispute Tribunal warranting reversal of the impugned Judgment.

34. The Secretary-General requests that the Appeals Tribunal dismiss Ms. Asghar's appeal in its entirety.

Considerations

35. A finding of fraud against a staff member of the Organization is a serious matter. Such a finding will have grave implications for the staff member's reputation, standing and future employment prospects. For that reason, the UNDT generally should reach a finding of

fraud only on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that each element of fraud (the making of a misrepresentation, the intent to deceive and prejudice) has been established in accordance with the standard of clear and convincing evidence. In other words, the commission of fraud must be shown by the evidence to have been highly probable.

36. Fraud consists in the unlawful making, with the intent to defraud or deceive, of a misrepresentation which causes actual prejudice, or which is potentially prejudicial, to another.

37. Relying solely on the transcript of the recorded telephone conversation, the UNDT made the following factual findings: i) the conversation indeed took place between Ms. Asghar and Mr. Asif; ii) Ms. Asghar's claim that the recording was a fabrication was given the lie by her contradictory assertions that it was a fabrication but also a part of a set-up; iii) the contents of the conversation were such that only Ms. Asghar could have known about the matters attributed to her in the transcript about the Child Labour Day conference activities, the PLaCES activities and the Serena Hotel; iv) the recorded conversation represents clear and convincing evidence that Ms. Asghar engaged in arranging and assisting in the submission and fulfilment of false claims from UNICEF resources for her personal benefit and causing financial and reputational loss to UNICEF; and (v) the conduct of Ms. Asghar as apparent from the recorded conversation amounts to breaches of Staff Rules 1.2(b), (g) and (m) and paragraph 2.1 of the UNICEF Policy Prohibiting and Combatting Fraud and Corruption.[7]

38. The UNDT thus based its finding of fraud exclusively on the transcript of the recorded conversation which it ruled to be "genuine" and admissible, despite the conversation having been secretly recorded. It concluded that the admissibility of the secretly recorded conversation depended on the discretion of the judge and in this instance the probative value of the evidence outweighed any prejudice caused to Ms. Asghar. The UNDT accordingly made the finding of fraud without regard to any evidence other than the transcript of the telephone conversation. It made no mention of, nor placed any apparent reliance on, the

[7] The provisions of the Staff Rules provide respectively and *inter alia* that staff members shall uphold the highest standards of integrity and not use their office for private gain, financial or otherwise, or allow their personal interests to interfere with the performance of their official duties and responsibilities. The UNICEF policy provides that fraud against UNICEF will constitute misconduct and will be grounds for dismissal.

contemporaneous e-mail correspondence or the testimony of any witness who appeared before it.

39. The principal issue on appeal before us is whether the evidence before the UNDT adequately supports the factual and legal conclusions that Ms. Asghar committed fraud.

40. It appears from the Judgment that the UNDT held an oral hearing as it ordinarily would be obliged to do in a disciplinary case. Article 16(2) of the UNDT Rules of Procedure provides that the UNDT shall normally hold a hearing in an appeal to it against an administrative decision imposing a disciplinary measure. The reason for that provision is self-evident. Disputes in relation to discipline require factual determinations of misconduct and review of sanctions of a consequential nature.

41. Articles 17 and 18 of the UNDT Rules of Procedure envisage the calling, examination and cross-examination of witnesses under oath and the proper consideration and determination of the relevance and admissibility of any evidence led during an oral hearing. Article 25 of the UNDT Rules of Procedure requires the UNDT to issue its judgments in writing and to state the reasons, facts and law on which they are based. It is incumbent on the judge in his or her judgment to set out the nature and content of the evidence and to make appropriate factual and legal findings in relation to it. This involves an analysis of its admissibility, its probative value (cogency, sufficiency, reliability and credibility) and its relevance to the issues in dispute (*facta probanda*) and/or the facts relevant to the facts in issue (*facta probantia*).

42. There is no discussion in the impugned Judgment of what transpired at the hearing before the UNDT or any analysis of the evidence that was adduced by the witnesses who testified. As mentioned, the UNDT essentially relied exclusively on the transcript of the recorded conversation and no other evidence to find that Ms. Asghar had committed fraud. The Judgment offers no insight into, and makes no findings about, who recorded the telephone conversation, who transcribed it, who introduced it into evidence or the basis upon which the UNDT concluded that the transcript was an accurate, truthful, reliable and complete account of the alleged conversation. The UNDT failed wholly to make these critical determinations. Nor, as stated earlier, did it discuss or evaluate the evidence in relation to the circumstances surrounding the PLaCES event as reflected in the contemporaneous correspondence.

43. There is no difficulty in principle regarding the admissibility of the recorded conversation on the basis of the manner in which it was procured, even though it perhaps involved an element of entrapment. Where evidence has been obtained in an improper or unfair manner it may still be admitted if its admission is in the interests of the proper administration of justice. It is only evidence gravely prejudicial, the admissibility of which is unconvincing, or whose probative value in relation to the principal issue is inconsequential, that should be excluded on the grounds of fairness. Hence, the problem in this case is not the secret recording of the conversation; it is rather the weight to be given to it. The evidence in relation to the conversation, in view of the manner in which it was introduced into the record, is entirely hearsay. It is written evidence, the probative value of which depends upon the credibility of a person (seemingly Mr. Asif) who did not testify before the UNDT.

44. While the damning content of the transcript of the telephone conversation is supported by the contemporaneous e-mails, these documents too are essentially hearsay. It may be accepted that the e-mails are what they purport to be—correspondence to and from the persons in the address lines; but their content remains hearsay unless it is confirmed by the authors or recipients of them. None of these persons were called to testify. The probative value of these e-mails depends upon the credibility of persons who did not testify and are thus also hearsay of lesser evidentiary weight.

45. Hearsay evidence, before a tribunal such as the UNDT which is an inquisitorial body, can and should be admissible in the interests of justice. The UNDT, before admitting such evidence, however, should have regard to: i) the making or absence of any objection to the evidence by any one of the parties; ii) the nature of the evidence; iii) the purpose for which the evidence is tendered; iv) the probative value of the evidence; v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; vi) any prejudice to a party which the admission of the evidence may entail; and vii) any other relevant factor.

46. Nothing in the Judgment of the UNDT indicates that it factually determined whether it was in the interests of justice to admit the hearsay evidence of the recorded conversation with reference to the appropriate considerations relevant to its admission. Moreover, as said, the UNDT made no attempt at all to analyse the evidence of the witnesses or the other evidence in relation to the PLaCES or the Child Labour Day conference events. Nor did it overtly examine the content of the recorded telephone conversation or the contemporaneous

correspondence to evaluate the probabilities of whether the elements of fraud had been sufficiently established by the totality of the evidence found to be reliable, credible and cogent.

47. A document purporting to be a transcript of a telephone conversation, without evidence identifying who recorded the conversation or transcribed it, and without any elucidation of the reason why the evidence was not given by the person upon whose credibility the probative value of such evidence depends, is not alone sufficiently cogent to constitute clear and convincing evidence of fraud.

48. The test for determining whether a staff member has committed fraud is to consider if the evidence establishes guilt on the higher standard of probability, beyond mere preponderance. The logical corollary is that the staff member should be acquitted of the charge if there is a reasonable chance that she might be innocent. The process of judicial or forensic reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the UNDT has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit on the charge) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only partly false or unreliable; but none of it may simply be ignored. The UNDT failed entirely to follow this approach. It did not undertake a coherent fact-finding exercise by considering the admissibility, credibility and reliability of all the evidence before it. The facts have not been adequately established and consequently there was not a proper and fair trial of the issues. The UNDT failed to exercise the jurisdiction vested in it and has committed consequent factual errors, resulting in a manifestly unreasonable decision.

49. That said, the contemporaneous correspondence, the OIAI investigation report and the contents of the transcript do indeed make out a *prima facie* case, or probable cause, that Ms. Asghar may have committed fraud. The available evidence, limited as it may be, accordingly does not permit this Tribunal merely to reverse the finding of the UNDT. This is an instance where the case must be remanded to the UNDT for additional evidence and decision in terms of Article 2(5) of the Appeals Tribunal Statute.

50. The Judge who authored the Judgment in this case is no longer a Judge of the UNDT. It follows that another Judge of the UNDT will need to be seized of the matter afresh.[8] Hence, acting in terms of Article 2(3) of our Statute, we direct the Judge to whom the matter is remanded to accept into evidence the existing record of the proceedings including the testimony of the witnesses who testified in the matter. The UNDT should limit its decision to establishing whether Ms. Asghar committed fraud and breached the Staff Rules and UNICEF Policy in relation to the PLaCES and Child Labour Day conference events; in particular, by determining whether Ms. Asghar unlawfully made misrepresentations, with intent to defraud or deceive, which caused actual or potential prejudice to UNICEF. With reference to relevant, admissible, credible and reliable evidence, it must set out on a sound evidentiary basis the precise nature of any misrepresentation, the manner and time of its making and the exact nature of any actual or potential prejudice caused to UNICEF. For these purposes, the UNDT is directed to use its powers in terms of Articles 16, 17 and 18 of the UNDT Rules of Procedure to conduct a further hearing and to call any additional witnesses it deems necessary by whatever means it considers appropriate.

51. In particular, but without derogating from its discretion to conduct the proceedings as it deems fit, the UNDT should make findings of fact in relation to the following specific factual issues:

i) When did the telephone conversation in the transcript take place?

ii) Who recorded the telephone conversation?

iii) By what means was the telephone conversation recorded?

iv) Who transcribed the audio recording?

v) Is the transcript a truthful, accurate and complete transcription of the audio recording?

vi) Did Mr. Chand visit the BBSA at 13h00 on 24 January 2015?

vii) Did the PLaCES event take place between 09h30 and 14h00 on 24 January 2015 as alleged by Ms. Asghar in her e-mail of 28 January 2015?

[8] In terms of Article 2(6) of the Appeals Tribunal Statute.

viii) Did Mr. Kamran and Mr. Sattar attend the BBSA hall on 24 January 2015?

ix) Is the description of the events which allegedly took place at the BBSA as set out in Ms. Asghar's e-mail of 28 January 2015 a truthful account?

x) Did UNICEF suffer a financial loss in relation to the PLaCES event?

xi) Did Ms. Asghar receive any financial benefit in relation to the PLaCES event?

xii) Did Ms. Asghar collude in fraud with the staff of the Society for Community Development to arrange kickbacks after making excessive and fraudulent charges paid to the Labour Department in respect of an International Child Labour Day conference?

52. In the event that the UNDT admits hearsay evidence in relation to the transcript of the telephone conversation, it should set out its reasons for the admission of the evidence being in the interests of justice and explain why the evidence was not given by the person upon whose credibility the probative value of the content of the conversation depended.

53. If the UNDT decides that the totality of evidence is sufficient to establish the alleged fraud and breach of the Staff Rules and UNICEF Policy, it should determine, in light of the nature of the deception, the actual or potential prejudice, and any other relevant considerations, whether dismissal is a proportionate sanction for this offence.

Judgment

54. The appeal is upheld and Judgment No. UNDT/2019/074 is hereby vacated.

55. The case is remanded to the UNDT in terms of Article 2(5) read with Article 2(6) of the Appeals Tribunal's Statute for fresh determination by a different judge and in accordance with the directions made in terms of Article 2(3) of the Appeals Tribunal's Statute as set out in paragraphs 50 to 53 of this Judgment.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding Cape Town, South Africa	Judge Raikos Athens, Greece	Judge Neven New York, United States

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar